No. 16-1466

In the Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

May government officials avoid the protections of the First Amendment by engaging in coercion laundering?

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INTEREST OF THE *AMICUS* AND SUMMARY OF THE ARGUMENT[1]

The Becket Fund for Religious Liberty is a non-profit law firm dedicated to the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund is concerned that if governments like Illinois are permitted to mask the coercive effect of their actions on religious objectors merely by interposing non-governmental intermediaries, then many of the protections of the First Amendment will be neutered.

ARGUMENT

This brief makes one simple point: a system of government coercion that violates the First Amendment cannot be sanitized by interposing other entities between the government doing the coercing and the private citizen being coerced. When a person uses third parties as intermediaries to mask the source of illicit funds, we call it money laundering. When government uses third parties as intermediaries to mask the source of coercion, we can call it coercion laundering.

Illinois has done exactly that. Illinois's coercive agency shop rule requires Petitioner to pay funds to a

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. Consents to the filing of this brief are on file with the Clerk.

private union rather than the government itself, but the effect is the same. And Illinois's religious accommodation scheme requires employees who religiously object to supporting a union to pay funds instead to a nonreligious charitable organization that is either agreed to by the union or designated by the Illinois Labor Relations Board. In each situation there is at least one non-governmental intermediary between the government and Petitioner. But ultimately it is the government that is forcing a private citizen who doesn't ascribe to a particular point of view to pay money to promote that point of view. If there is to be an opt-out for religious objectors, it ought to be a true opt-out, not a fake one.

I. Government attempts to mask coercion using third parties are common.

As we use it here, "launder[ing]" is an action that "disguise[s] the source or nature of (illegal funds, for example) by channeling through an intermediate agent." *Cuellar* v. *United States*, 553 U.S. 550, 558 (2008) (quoting American Heritage Dictionary 992 (4th ed. 2000)). In a typical money laundering case, the law looks past the legitimate business that received the money to the criminal seeking to disguise his ill-gotten gain. See 18 U.S.C. 1956. The same concept applies under federal laws prohibiting straw purchases of firearms. See 18 U.S.C. 922(a)(6); 18 U.S.C. 924(a)(1)(A). Federal law prohibits felons from purchasing firearms; straw purchaser statutes forbid selling guns to a middleman who intends to deliver them to, *inter alia*, a felon. See generally *Abramski* v. *United States*, 134 S. Ct. 2259, 2265 (2014).

Although "laundering" is most often used in the context of criminal activity, the idea applies just as well to situations where government officials want to hide government coercion by interposing third-party intermediaries. Unfortunately, coercion laundering has become a common method of evading constitutional and civil rights restrictions on government activities.

In the typical case, the government requires a private citizen to interact in a specified way with a private third party. At the same time, the government claims that the coercion is more attenuated because there is a third party in between the government and the citizen. By interposing the third party, the government purports to wash its hands of the coercion.

This Court has long rejected coercion laundering in criminal procedure. So, for example, the government cannot avoid rules against entrapment by having a private citizen do the inducing: courts will look beyond the actions of the citizen to the federal agent who stands behind him. See, *e.g.*, *Mathews* v. *United States*, 485 U.S. 58, 60 (1988) (valid entrapment defense raised by a government official who was allegedly bribed by a friend cooperating with the FBI). *Sherman* v. *United States*, 356 U.S. 369, 376 (1958) (treating a confidential informant as an agent of the government in an entrapment case).

Likewise, in the civil context, efforts at coercion laundering are routinely rejected. See, *e.g.*, *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (holding the government responsible for equal protection violations by a restaurant that contracted to oc-

cupy space in a state-owned parking structure); *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.").

In recent years, one example of attempted coercion laundering came before the Court in *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013) ("*AOSI*"). In that case, the federal government administered a program that funded efforts by nongovernmental organizations to combat HIV/AIDS worldwide. See *id.* at 2325. As a condition to receiving funding under the program, grant recipients had to adopt a "policy explicitly opposing prostitution." *Id.* at 2326. After it was sued, the government issued regulations seeking to accommodate objecting nonprofit organizations. These "affiliate guidelines" would, according to the government, allow nonprofit organizations to "decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds." *Id.* at 2331. In other words, the government believed that it could avoid the unconstitutional conditions doctrine by filtering its coercive policy through an affiliate organization.

The Court rejected the government's regulatory gambit, holding that the affiliate workaround would allow expression of the organization's "beliefs only at the price of evident hypocrisy." *AOSI*, 133 S. Ct. at 2331. Interposing an affiliate thus did not cleanse the government's conditions of unconstitutionality, and the program was struck down.

In *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), Congress set up a "Mushroom Council" to act as a third party to decide how to use monetary contributions the government compelled large mushroom growers to submit. Most of the compelled funds went to subsidize speech that the plaintiff mushroom grower disagreed with. The Court rejected the government's attempt to compel speech through a government-created third-party intermediary. The existence of the Mushroom Council could not veil that ultimately the government was responsible for the compelled speech.

Continued sensitivity to coercion laundering is required to ensure that fundamental rights are not infringed through third-party, non-governmental or quasi-governmental bodies. For instance, in the higher education context, the government uses accrediting agencies as the gatekeepers for federal funding[2]—funding that often is critical to an educational institution's survival. See, *e.g.*, *Chi. Sch. of Automatic Transmissions, Inc.* v. *Accreditation Alliance of Career Schs. & Colleges*, 44 F.3d 447, 449 (7th Cir. 1994) (Easterbrook, J.) ("An accrediting agency is a proxy for the federal department whose spigot it opens and

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[2] The Department of Education maintains a list of recognized accrediting bodies. See U.S. Dep't of Education, Accreditation: Universities and Higher Education, https://www2.ed.gov/admins/finaid/accred/accreditation_pg5.html#NationallyRecognized (last visited Dec. 5, 2017). Only schools that are accredited by a recognized accrediting body are eligible to receive Title IV funding, including federal student aid. 20 U.S.C. 1001, 1002.

closes."). To be recognized, accreditors must demonstrate a basic level of competence, 20 U.S.C. 1099b(a), but they alone set the substantive standards that educational institutions must meet to be accredited, 20 U.S.C. 1099b(g) and (o). Accreditors may seek to exploit this power by conditioning accreditation on a school's acceptance of the accreditor's views on contested social and moral issues. In 2002, for example, the American Psychological Association's accrediting arm considered eliminating an exemption allowing religious schools to give preference to students and faculty from the same religious affiliation. That effort failed only after considerable backlash, including threats from the federal government that the APA might lose its recognized-accreditor status. D. Smith, *Accreditation Committee Decides to Keep Religious Exemption*, 33 Monitor on Psychology, Jan. 2002, at 16, http://www.apa.org/monitor/jan02/exemption.aspx. Undeterred by the APA's failure, however, another accrediting agency years later threatened Gordon College, an evangelical non-denominational Christian school, with the loss of accreditation because of the college's biblically based policy on marriage and sexuality. Mary Moore, *Accreditation Board Gives Gordon College a Year to Review Policy on Homosexuality*, Boston Business Journal, Sept. 25, 2014, http://m.bizjournals.com/boston/news/2014/09/25/accreditation-board-gives-gordon-college-a-year-to.html.

Despite the coercive power accreditation agencies enjoy, courts have consistently found them not to be state actors, effectively exempting them from complying with constitutional standards. *Hiwassee Coll., Inc. v. S. Ass'n of Colleges & Schs.*, 531 F.3d 1333, 1335 (11th Cir. 2008) ("[T]he overwhelming majority of

courts who have considered the issue have found that accrediting agencies are not state actors."). And even when the federal government puts statutory limits on accreditors' ability to violate the constitutional rights of accredited institutions, courts have held that individual plaintiffs have no private cause of action to vindicate those rights. See, *e.g.*, *Thomas M. Cooley Law Sch.* v. *Am. Bar Ass'n*, 459 F.3d 705, 710-11 (6th Cir. 2006) (no private cause of action to enforce the Higher Education Act's limitations on accreditors' ability to punish religious universities for their religious beliefs); see also *McCulloch* v. *PNC Bank Inc.*, 298 F.3d 1217, 1221 (11th Cir. 2002) (collecting cases). Coercion laundering's success in the accreditation context has only become more troubling in recent years, as the relationship between the Department of Education and accrediting agencies has grown ever cozier. See, *e.g.*, *Auburn Univ.* v. *S. Ass'n of Colleges & Schs., Inc.*, 489 F. Supp. 2d 1362, 1373 (N.D. Ga. 2002) (the government's "much closer relationship with the accrediting agencies" might necessitate a reevaluation of the determination that such agencies are not state actors); see also Julee T. Flood & David Dewhirt, *Shedding the Shibboleth: Judicial Acknowledgement that Higher Education Accreditors Are State Actors*, 12 Geo. J.L. & Pub. Pol'y 731 (2014) (describing the increasing expansion of federal oversight into accreditation and arguing that accreditors should be considered state actors).

As the Gordon College example illustrates, coercion laundering may be used to subvert a range of constitutional rights, including freedom of speech, association, and religion. But governments have found coercion laundering to be an especially attractive way of

attempting to avoid their obligation to accommodate sincere religious belief. For example, several public universities have relied on an ethics code promulgated by the private American Counseling Association to justify disciplining students who seek to refer certain counseling clients rather than violate their religious beliefs regarding human sexuality and marriage. *See Ward* v. *Polite*, 667 F.3d 727, 735 (6th Cir. 2012) (concluding that a jury should be allowed to consider whether "the university deployed [the ACA code of ethics] as a pretext for punishing [the student's] religious views and speech"); *Keeton* v. *Anderson-Wiley*, 664 F.3d 865, 875 (11th Cir. 2011) (relying on the ACA code of ethics to justify the expulsion of a Christian counseling student).

Similarly, state prison officials have taken to a specialized form of coercion laundering—"rabbi shopping"—to avoid having to accommodate religion. Florida officials, for example, seeking to avoid the costs of providing Orthodox Jewish inmates with access to kosher food, have retained rabbis from the Reconstructionist stream of Judaism as consultants, relying on these rabbis—who do not share the beliefs of the Orthodox inmates—to bless prison meal plans as religiously adequate. See Decl. of Rabbi Menachem M. Katz, *Lawson* v. *Florida Dept. of Corrs.*, No. 4:04-cv-00105-MP-GRJ (N.D. Fla., filed Apr. 7, 2006), ECF No. 59-2 (describing non-kosher nature of meal program and Florida's reliance on Reconstructionist rabbi). Similarly, prison officials in New York and Washington have permitted chaplains' assessments of whether prisoners were really Jewish—rather than the prisoners' own sincerely held beliefs—to deter-

mine whether the prisoners would have access to religious items like kosher diets and the Torah. Compare *Florer* v. *Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 919 (9th Cir. 2011) (holding that the prison's "contract" rabbis were not state actors) with *Jackson* v. *Mann*, 196 F.3d 316, 318-19 (2d Cir. 1999) (holding prison liable for relying on its Jewish chaplain's determination of whether a prisoner was Jewish rather than considering the prisoner's sincerely held belief). In each of these examples, state officials used a third party to do what they could not do themselves: second-guess the plaintiffs' religious beliefs.

Likewise, the federal government has attempted to shirk its responsibility to accommodate religious exercise under the Religious Freedom Restoration Act (RFRA). Perhaps most famously, in regulations passed under the Affordable Care Act, the federal government outsourced to a private entity called the Institute of Medicine (IOM) the task of identifying a list of women's "preventive care" services that employers' health plans would be required to cover. See *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014). IOM, in turn, placed on the list "all [FDA] approved contraceptive methods [and] sterilization procedures"—a group that includes drugs and devices that can cause abortions, *id.* at 2762-63 & n.7—thus requiring employers whose religious beliefs required them to provide their employees health insurance excluding coverage for abortifacients, contraceptives, or sterilization to violate their beliefs or else incur crippling fines. *Id.* at 2776; see also *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1559-60 (2016). Thus it was that "a private organization, not answerable to the public * * * ended up dictating regulations that the government" for

years "insist[ed] override[] the * * * constitutional rights to religious liberty" of religious employers. *Conestoga Wood Specialties Corp.* v. *Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 391 n.2 (3d Cir. 2013) (Jordan, J., dissenting), *rev'd sub nom. Hobby Lobby*, 134 S. Ct. 2751.

The federal government has sought to coercion launder its way around RFRA by exploiting its cooperation not just with private entities (like IOM) but also state and local governments. For instance, federal agencies have recently taken the position that RFRA does not apply when a Native American sacred site is destroyed in the course of a highway construction project on federal land, provided state transportation agencies—rather than federal agents themselves—were the parties who physically accomplished the destruction. Mot. for Partial Summ. J. at 23-25, *Slockish* v. *FHWA*, No. 3:08-cv-01169 (D. Or., filed May 16, 2017); *cf. Standing Rock Sioux Tribe* v. *U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 89 (D.D.C. 2017), *appeal dismissed sub nom. Standing Rock Sioux Tribe* v. *U.S. Army Corps of Eng'rs*, No. 17-5043, 2017 WL 4071136 (D.C. Cir. May 15, 2017) (describing, but not reaching, the government's argument that RFRA did not apply to the Dakota Access Pipeline project because "Dakota Access's operating of the pipeline," rather than the government's "permitting," burdened Native Americans' religious exercise). And in a case involving a plan to relocate a church cemetery to accommodate an airport expansion, the D.C. Circuit held that RFRA was inapplicable because the plan—although "screened, studied, chose[n], modified, and approved" by a federal agency—was "implement[ed]" by a city government. *Vill. of Bensenville* v. *FAA*, 457

F.3d 52, 57, 59–68 (D.C. Cir. 2006); *id.* at 73 (Griffith, J., concurring in part and dissenting in part). The *Bensenville* dissent viewed this result as approving classic coercion laundering: the majority had excused "a federal agency [from] consider[ing the church's] free exercise rights under RFRA even though it [was] extensively involved in [the] state or local project," and even though the agency had "conceded that the plan * * * would substantially burden [the church's] religious exercise." *Bensenville*, 457 F.3d at 73 (Griffith, J., dissenting).

This case presents an important opportunity for the Court to establish doctrines that guard against coercion laundering through quasi- or nongovernmental bodies that act as gatekeepers to government benefits. By identifying the Illinois scheme as what it truly is—a state-led effort to condition public employment on coerced funding and forced association—the Court will set a precedent that will help curtail other unlawful attempts at coercion laundering.

II. Coercion laundering cannot save Illinois's scheme.

Illinois's scheme now before the Court is another instance of attempted coercion laundering and should be struck down like the programs in *AOSI* and *United Foods*.

The baseline First Amendment rule is simple: "[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris* v. *Quinn*, 134 S. Ct. 2618, 2644 (2014). As a result, "compulsory subsidies for private

speech are subject to exacting First Amendment scrutiny." *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 210 (2012).

Illinois requires its objecting employees to support speech they do not wish to support in at least two ways. First, all public-sector employees are required as a condition of employment to either pay to join the organization or "pay a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." 5 Ill. Comp. Stat. Ann. 315/6(a). As Petitioner has explained, this system results in compelled political speech and must meet strict scrutiny. Pet'r's. Br. at 20-21. That the objected-to speech is carried out by a union or that the money flows into the union's coffers should not serve to veil the government coercion.

The second pathway for compelled speech is no better. Illinois also compels public school employees with religious objections to trade unionism—such as Seventh-day Adventists—to speak. Religious objectors must pay an equivalent fee to "a nonreligious charitable organization mutually agreed upon by the employees affected" and the union. 5 Ill. Comp. Stat. Ann. 315/6(g). If employees and the union cannot agree, then the Illinois Labor Relations Board is authorized to create a list of acceptable organizations. *Ibid.* The compulsion is still there, even though the government has run it through private intermediaries. *See Brian K. Trygg and State of Illinois, Department of Central Management Services and General Teamsters/Professional and Technical Employees, Local Union 916*, 32 PERI ¶ 164 (IL LRB-SP 2016) (Case Nos. S-CA-10-092

and S-CB-10- 024) (rejecting a religious employee's request to direct his contribution to a religious organization instead of a non-religious charity).

The system in this case—like the systems in *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *Knox*, and *Harris*—results in compelled funding for the union or—in the case of religious objectors—for a set of charities that the union or the government help to select. Illinois's emphasis on the benefits of public sector unions cannot obscure the fact that the state is using its power to coerce public school employees to support speech with which some of them disagree. To allow Illinois to avoid strict scrutiny is to permit a form of coercion laundering, where the state is able to hide behind the interests of a third party—the union—and escape responsibility for its own actions. The law rejects such two-faced schemes in the context of money laundering. The Court should do the same here.

CONCLUSION

Like many other governments, Illinois demands, "Pay no attention to that [government] behind the curtain!" But the Court should pay attention. Whether government directly compels speech or indirectly compels it behind a veil of third parties, if the ultimate source of the coercion is government, it should be subjected to strict scrutiny. The Court should reverse the decision below and overrule *Abood*.

Respectfully submitted.

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